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No. 89-114

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

LEONARD M. FREEMAN, M.D.,

Petitioner,

vs.

HEIDI WEISSMANN, M.D.,

Respondent.

OBJECTION AND BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

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Respondent HEIDI S. WEISSMANN for the following reasons respectfully opposes the Motion to File a Brief Amici Curiae in support of the Petition proffered by Abass Alavi, M.D. et al. in their "personal capacities." (Amici Br. 4)[1]

[1] References to "Amici Br." are to the proffered Brief Amici Curiae followed by the page number. References to "Pet." and "Pet. App." are to the Petition for Certiorari and to the Appendix to the Petition for Certiorari, respectively. References to "Resp. Br." are to Respondent's Brief in Opposition to the Petition for Certiorari.

Preliminary Statement

Respondent did not consent to the filing of the Amici Brief for two reasons: first, counsel for the Amici, though requested to, did not advise respondent's counsel of the Amici's identities beyond indicating that they would be individual doctors; second, counsel for the Amici did not indicate the nature of the Amici's interest nor provide any reasons why they could add anything to the presentation of the Petition. As shown below, the disfavor for such briefs in support of a petition for certiorari, see Rule 36.1, has particular application here, in view of the failure of the Amici's Motion to specify their particular interests and reasons for believing that any questions involved in the Petition have not or cannot be adequately presented by the parties.

I.

THE AMICI ARE A NARROW GROUP OF INDIVIDUALS WHO ARE NOT REPRESENTATIVE OF THE COMMUNITIES FOR WHOM THEY PURPORT TO SPEAK

Petitioner's Amici are a narrow group of individual scientists, almost all medical doctors, specializing in the single field of nuclear medicine.[2] According to Respondent, a specialist in the same field, all of them are also long-time colleagues and personal friends of the petitioner. More significantly, not one of the Amici is a scientist or medical doctor in any other field and not one of them – including the eighteen (18) of the Amici who are department heads – has been able to interest any institution, professional society, hospital, publisher, drug or radiopharmaceutical company, writers' organization or any other representative body to join their attempt to suggest a basis for exercise of the Supreme Court's *certiorari* jurisdiction.

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[2] All of the Amici are also members of one society, of which petitioner is a past president, the Society of Nuclear Medicine, where various of them serve on committees with petitioner. Source: 1989 Membership Directory, Society of Nuclear Medicine.

If anything, the Amici's identities only demonstrate the total absence of any interest in the scientific and educational communities in participating in their effort. Thus, not one of the 74 existing organizations in the insular, specialty field in which both parties work as scientists, namely, radiology or nuclear medicine[3], has joined this effort, even though virtually every one of the Amici is a "Chief", "Chairman," "Director," or "Head" of his own institution's department of nuclear medicine (Amici Br. 4)[4] and even though many have served as head and/or president of various of these specialty organizations.[5] Particularly striking is the fact that not one of the institutions where 18 of the Amici serve as department heads has been willing to support their effort, including Montefiore Medical Center and the Albert Einstein College of Medicine where petitioner himself serves as Director of Nuclear Medicine and Vice Chairman of Nuclear Medicine, respectively. Finally worth noting is the absence of any other individual teacher or professional, let alone a department head, from petitioner's own places of professional activity in joining the Amici's effort.

II.

THE INDIVIDUAL AMICI ESPOUSE A VIEW THAT IS DISAPPROVED BY THEIR PROFESSION

The reason why the scientific, medical and research communities have shunned the Amici's efforts is their disapproval of the concept of "honorary authorship" which the Amici Brief

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[3] Source, "Organizations in Radiology 1989", published by American College of Radiology, 1891 Preston White Drive, Preston, Virginia 22091.

[4] Eighteen of the 21 amici appear to be in this category.

[5] The Amici cannot even speak for as narrow an organization as the Society of Nuclear Medicine, inasmuch as they form a distinctly minute group of 21 individuals out of 10,443 members. Source: "Organizations in Radiology 1989," *supra*, p. 70.

espouses.[6] The Amici, as department heads and very senior professionals, represent the interests of those who urge the creation of a legally privileged sanctuary for a practice that would require junior scientists to credit their superiors with copyright co-ownership on the basis of seniority, without regard to actual authorship efforts and without regard to the copyright laws which by statute apply equally in all fields to all kinds of works.

III.

INSTEAD OF SHOWING THAT THE PARTIES CANNOT ADEQUATELY PRESENT THE ISSUES, THE AMICI HAVE CONSTRUCTED A SERIES OF FALSE PREMISES AS THE BASIS FOR THEIR ARGUMENTS

The Motion of the Amici has omitted any showing of why the parties cannot adequately present the questions raised by the Petition. Not only have the parties adequately presented the issues, but their familiarity with the record and obligations to deal with it have required them, unlike the Amici, to address the key facts that the Amici Brief has chosen to disregard. Most significant here is the Amici's effort to build their argument upon the false factual premises that petitioner and respondent had been "alternat[ing]" in revising and preparing versions of the predecessor articles to the work at issue, P-1 (Amici Br. 8) and that "some" of the newly added material to P-1 "was prepared by Dr. Freeman" (*id.* 5). As respondent has demonstrated (Resp. Br. 3-4 and 10-14), petitioner conceded that he did not participate in

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[6] "Honorary authorship" is the term used to describe a procedure of requiring the addition of the names of chiefs, heads or other senior members of departments or laboratories on all research papers prepared by junior or less senior members. It has been generally condemned in the scientific community, including medicine in particular, because of the dangers it poses to the quality control and integrity of research, as well as its unfairness. *See, e.g.*, the "Guidelines for Investigators in Scientific Research" developed by the Harvard Medical School discussed in the *Journal of the American Medical Association*, October 1988, Vol. 260, No. 13, p. 1837; *see also* Vol. 241, July 29, 1988, p. 525, *Science* magazine, published by the American Association for the Advancement of Science.

creating any of P-1's new matter, and P-1's predecessors were *jointly* authored and owned.[7]

Because they are so divorced from the interests of the institutions, organizations and the authors, including less senior professionals, who finance and create scientific works, the Amici have also felt free to make assertions about the law having no basis in reality. Thus, without citation to any legislative or judicial authority, they boldly proclaim that when one of two joint authors adds a new contribution to an earlier joint work, he or she cannot claim any exclusive right in the newly added creation, *irrespective* of who participated in the new authorship of the paper and *irrespective* of the parties' intentions (at the time of the new writing) to have or not to have such individually-prepared new matter be part of a joint work. (Amici Br. 9) They similarly claim that the requisite mutual intention for a work like P-1 to be a joint work is automatically established or "manifested" by virtue of "the merger itself" of the new material (created by only one author) with the older pre-existing material (Amici 9). However, such an automatic rule would flow in all cases from any prior collaborative effort and continue forever in the absence of a "divorce" between once joint authors. This flies in the face of Section 103(b) of the Copyright Act and the specific explanation by the Congress in the legislative history that this is exactly the danger that has been eliminated by the way in which Section 103(b) works together with the definition of a "joint work"

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[7] Such inaccurate suggestions are accompanied by repeated statements about the usual "expectations" and "arrangements" supposedly made between collaborators who are both engaged in a continuing joint laboring (Amici Br. 7-8). But these have nothing to do with the work involved in this case, P-1, which was concededly not the result of a joint authorship effort. The Amici's additional portrayal of the Second Circuit as assuming that joint works and derivative works are mutually exclusive categories is belied by the very quotation from its opinion that the Amici set forth in footnote 2 ("joint work" versus "*individual* derivative work", Pet. App. A-3, [emphasis supplied]), as well as by the Court of Appeals' separate discussions of joint authorship and derivative works. These make it clear that the conclusion that P-1 is protectible as a derivative work played no role in the Second Circuit's separate evaluation of whether P-1 was a joint work. *See* Pet. App. A 7-21 and especially A-11.

in Section 101. *See* House Report at 120; Second Circuit opinion, Pet. App. A 8-9 & 10.[8]

The Amici's unrepresentative role as spokespersons for "honorary authorship" for senior professionals such as themselves has also led them astray in their fair use arguments. For example, they insist on an absolute fair use rule which, as they explain it, "requires that a joint author's use of his co-author's individual derivative work based upon the parties' preexisting joint works be deemed a fair use" (Amici Br. 11). This not only would nullify the statutory right of each co-author to use the joint work to prepare and own exclusively his own derivative work, *see* note 8 *supra*, but disregards the fact-specific nature of the fair use determination here, where petitioner sought to pass-off as entirely his own a work to which he made no authorship contribution. There can be no question that the unprecedented unfairness of such conduct is precisely the kind of fact, along with others, that authorizes an appellate court not to "remand for further fact finding" but to "conclude as a matter of law" that the challenged use does not qualify as a fair use, as occurred here. *See Harper & Row Publishers v. Nation Enterprises*, 471 U.S. 539, 560 (1985).[9]

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[8] Contrary to the endeavor to invent a new question worthy of Supreme Court review (Amici Br. 6), the statute and legislative history themselves are thus clear in showing how the finely calibrated provisions relating to joint and derivative works interrelate. *See also* House Report at 57. And the right of each joint author to prepare his own derivative work has been recognized by appellate and lower courts (*see* Resp. Br. 12; 1 M. Nimmer & D. Nimmer, Nimmer on Copyright (1988), §6.10 at 6-22) and is basic copyright doctrine (Resp. Br. 11).

[9] The Amici's claim that petitioner's use was fair because it was "for teaching purposes" (Amici Br. 11) similarly disregards the facts that the actual use here failed to comply with the three minimum fair use standards agreed upon between the major lobbying groups on the 1976 Copyright Act, and most notably with the requirement that the user properly give credit on the copied materials. *See* "Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions," House Report at 68-70; *Marcus v. Rowley*, 695 F.2d 1171, 1178 (9th Cir. 1983) (holding these "minimum" standards even to qualify for consideration of fair use defense); *see also* 17 U.S.C. §108 similarly requiring use of copyright owner's copyright notice even on statutorily permitted photocopying by libraries. Petitioner, in any event, is not a not-for-profit educational institution.

Conclusion

In view of the foregoing, the Motion for Leave to File a Brief Amici Curiae herein should be denied.

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